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IN THE

# Supreme Court of the United States

October Term, 1980

PENTHOUSE INTERNATIONAL, LTD., *et al.*,

*Appellants,*

*vs.*

RANCHO LA COSTA, INC., *et al.*,

*Appellees.*

**Motion of The Times Mirror Company, Dow Jones & Company, Inc., McClatchy Newspapers, National Broadcasting Company, Inc., California Newspaper Publishers Association, Inc. and Radio & Television News Association of Southern California for Leave to File Brief as Amici Curiae, and Brief of Amici Curiae in Support of the Jurisdictional Statement and Appeal of Penthouse International, Ltd., et al.**

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The Times Mirror Company, Dow Jones & Company, Inc., McClatchy Newspapers, National Broadcasting Company, Inc., California Newspaper Publishers Association, Inc. and Radio & Television News Association of Southern California respectfully move hereby for leave to file the attached brief as *amici curiae* in support of the jurisdictional statement of Penthouse International, Ltd., et al., in their appeal from the Court of Appeal of the State of California. Consent to the filing of said *amici curiae* brief has been

obtained from the appellants. Appellees have refused to consent.

The Times Mirror Company publishes the *Los Angeles Times*, which has a general daily circulation of more than one million copies, the *Orange Coast Daily Pilot* (a California community newspaper), and newspapers in New York, Texas and Connecticut. Dow Jones & Company, Inc. publishes the largest daily newspaper in the United States, *The Wall Street Journal*, and numerous other publications. McClatchy Newspapers publishes *The Sacramento Bee*, and has ownership interests in newspapers in the Western States. The National Broadcasting Company, Inc. operates one of the three major television networks in the United States and owns and operates various television stations, including KNBC in Los Angeles. The California Newspaper Publishers Association, Inc. promotes newspaper publication in the State of California and has approximately 460 California newspapers as members. The Radio & Television News Association of Southern California is composed of persons interested in and involved in newsgathering by the broadcast media.

As such, *Amici* have a vital interest in the adverse effects certain to result from the California Court of Appeal's misapplication of the principles enunciated by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979). Unless reviewed and corrected by this Court, the California Court of Appeal's decision is certain to deprive the public of access to vitally important reporting concerning organized crime.

Appellants' brief does not focus upon the fact that the California Court of Appeal's decision completely upsets the balance this Court has carefully established between the First Amendment rights of the press and public and a per-

son's right to protect his reputation by suing for libel. *Amici* seek leave to file the attached brief to develop that argument.

Respectfully submitted,

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## Interest of Amici Curiae.

*Amici* represent the following substantial media interests in the State of California and elsewhere:

The Times Mirror Company, publisher of the *Los Angeles Times*, which has a general daily circulation of more than one million copies, the *Orange Coast Daily Pilot* (a California community newspaper), and other newspapers in New York, Texas, and Connecticut.

Dow Jones & Company, Inc., publisher of *The Wall Street Journal, Barron's Business and Financial Weekly*, several news services, books and a number of community newspapers. *The Wall Street Journal*, with a circulation of 1.8 million (more than 225,000 in California), is the largest daily newspaper in the United States and is distributed daily in every state.

McClatchy Newspapers, Sacramento, California, publishes *The Sacramento Bee*, *The Modesto Bee* and *The Fresno Bee* with a combined daily circulation in the central valleys of California of more than 450,000 copies. In addition, McClatchy Newspapers publishes various other newspapers, including *The Tri-City Herald* in Pasco, Washington and *The Anchorage Daily News* in Alaska and a number of community newspapers. McClatchy Newspapers also operates four AM and four FM radio stations in California and Nevada, and a television station KMJ-TV, in Fresno, California.

National Broadcasting Company, Inc. ("NBC"), owner and operator of the NBC television network, which serves NBC's five owned and operated television stations, including KNBC, Channel 4, in Los Angeles and numerous affiliated television stations throughout the United States. (NBC also owns and operates a radio network which serves numerous NBC-owned and operated stations as well as affiliated radio stations. NBC itself owns and operates two radio stations in California.)

The California Newspaper Publishers Association, Inc., a California corporation whose purpose is the promotion, preservation and advancement of newspaper publication in the State of California. Its membership consists of approximately 460 newspapers published in the State of California, including all major metropolitan and most community newspapers.

The Radio & Television News Association of Southern California is a non-profit corporation which includes as active members individuals who gather news for the broadcast media and as associate members individuals who are interested in the broadcast media.

On June 6, 1980, the California Court of Appeal determined that appellees, owners of a heavily advertised spa financed by monies from reputed underworld sources, were not public figures and that a media defendant could be held strictly liable for defaming them. *Amici* are convinced that the opinion below drastically constricts the ability of newspapers and broadcasters to report upon the activities of organized crime. *Amici* additionally believe, and will argue in this brief, that the opinion represents a culmination of decisions purporting to find a "trend" against rights of free speech and press and in favor of the "privacy" of those with vast influence over public affairs, who seek to limit the public's knowledge about them to only the desirable aspects of their activities.

**Questions Presented.**

1. Have the courts of California, purporting to find a "trend" from this Court's decisions and relying upon a State constitutional "right of privacy," restricted this Court's protections of speech and press initiated in *New York Times Co. v. Sullivan* so as to vitiate the goals of the First Amendment and require a review by this Court to restore the proper balance between the First Amendment and protection of reputation?

2. Are the corporate and individual owners of a large, heavily promoted spa, who financed their operation through the controversial Teamsters' Union Central States Pension Fund and who permitted themselves to acquire a widespread and well-publicized reputation of connections with orga-

nized crime, public figures for the purpose of reportage about those activities?

3. May California return to "no fault" principles of defamation in cases where media defendants are unable to prove the subjects of their publications to be public officials or public figures?

## ARGUMENT.

The opinion of the court below (106 Cal. App. 3d 646, 165 Cal. Rptr. 347, 6 Media L. Rep. 1351 (1980)), (App. B 1-28) reaches its constrictive result by:

(i) Tracing decisions of this Court from *New York Times Co. v. Sullivan*[1] through *Rosenbloom*,[2] *Gertz*,[3] *Firestone*,[4] *Wolston*[5] and *Hutchinson*[6] and purporting to find a trend of such decisions to narrow sharply the ambit of non-malicious news reportage which is safe from civil punishment and

(ii) Construing the recently promulgated California constitutional right of "privacy" into an interest paramount to protections of speech and press of the reportage of matters of legitimate public interest and concern.

Utilizing such techniques, the California Court of Appeal subjected publishers and broadcasters who attempt to inform the public of the activities of those widely reputed to be connected with organized crime to civil punishment unless they can prove that the subjects of their publications are indeed criminals — a task which thus far has largely eluded the powers of local, state and federal governments.[7]

As noted in the opinion itself, other California courts, including its Supreme Court, have similarly circumscribed

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[1]376 U.S. 254 (1964).
[2]*Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).
[3]*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
[4]*Time, Inc. v. Firestone*, 424 U.S. 448 (1976).
[5]*Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979).
[6]*Hutchinson v. Proxmire*, 443 U.S. 111 (1979).
[7]The paucity of convictions does not, of course, indicate that organized crime does not exist. U.S. Department of Justice, National Conference on Organized Crime 18 (recognizing the important role of the media in combating organized crime) and 21-25 (1975); National Advisory Committee on Criminal Justice Standards and Goals, Task Force on Organized Crime 7-33, 137-141 (1976); E. Kefauver, *Crime in America* (1951).

the constitutional protections of news reportage in California. The following holdings are exemplary:

> A public school teacher who admittedly had at least twice become the subject of public concern by reason of her penchant for reading vulgar-language materials to her students was held to be neither a public official nor a public figure required to prove malice when seeking to impose civil damages upon a publisher which criticized that conduct.[8]
>
> Distress merchandisers engaged in a heavily advertised closeout sale from a city landmark department store were held entitled to seek damages for the nonmalicious publication of criticism of the truth of that advertising.[9]

The cumulative sweep of these decisions, capped by the opinion now presented to this Court, grossly inhibits all news reportage save accounts of the noisy doings of politicians and those prone to mount rostrums. The activities of immensely powerful people who affect the lives of citizens in a far more meaningful manner than streetcorner criers is now too dangerous to report. Such people can finance lawsuits through to conclusion and punish publishers by inflicting years of expense and grief, if not ultimate judgments, when freed of the necessity of proving that the publication was maliciously false.[10]

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[8] *Franklin v. Benevolent etc. Order of Elks*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

[9] *Vegod Corp. v. American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), *cert. den. sub nom., American Broadcasting Companies, Inc. v. Western Institute of Retailing, Inc.*, .... U.S. .... (1980).

[10] The significance of the lessened fault standard is not limited to likelihood of eventual judgment. For regardless of the plaintiff's ability to demonstrate damages and secure a jury verdict, a determined plaintiff required only to prove negligence can easily escape summary judgment and secure monetary revenge upon the publisher by provoking and prosecuting years of expensive, time draining litigation. *Compare Yiamouyiannis v. Consumers U. of the United States*, 619 F.2d 932, 940 (2d Cir. 1980), U.S. appeal pending, *with* 6 (Part 2) *Moore's Federal Practice* ¶ 56.17 [42], p. 56-946 & n.4 (summary judgment is ordinarily unavailable in negligence cases).

It is time, surely, for this Court to make clear that the process of balancing the interests of private reputation versus public information initiated in *Gertz* shall not eviscerate the goal sought to be achieved by applying constitutional protections to private libel actions.

> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co. v. Butts, supra,* at 152. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise.[11]

The thrust of recent decisions in California, culminating in the decision below, demonstrates no "anxiety" at all to preserve the "breathing space" necessary to the fruitful exercise of freedom of speech and press. Rather, these decisions choke off reportage of matters of vital concern to the public—here, the involvement of widely reputed crime figures in a supposedly legitimate business.

The appellants have presented uncontroverted evidence which should more than suffice to cause appellees to be held to be public figures under the *Gertz* rationale. They proved:

(a) Appellees are the owners of a large Southern California resort and spa.

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[11]*Gertz v. Robert Welch, Inc., supra,* 418 U.S. 323, at 342.

(b) They heavily promote and advertise that spa as a suitable and desirable place for families and business people to patronize.

(c) They finance their operation through a union pension fund which has been embroiled constantly in scandals related to the activities of those reputedly connected with organized crime.

(d) Appellees themselves, and frequent users of the spa, permitted themselves to acquire a widespread and heavily publicized reputation of affiliation with organized crime and have accordingly provoked frequent news commentary respecting those affiliations as well as investigations by assorted police agencies.

The allegedly defamatory article brought to public attention the background of the owners and operators of this lavishly promoted spa; naturally, the ads paid for by the owners did not choose to present such a full picture of Rancho La Costa to the public.

Essentially this Court in *Gertz* held that one who performs acts which "invite attention and comment"[12] must endure such attention and comment unless it is consciously or recklessly false. The uncontradicted evidence in this case should more than suffice to establish that appellees fit that category: they entered business dealings with reputed organized crime personalities knowing that such dealings invite press attention; they performed many acts publicly relating to the promotion of their business venture; they permitted without challenge years of extensive publication respecting their affiliation with organized crime. Nevertheless, the California Court of Appeal ignored the evidence which competently proved the longstanding unsavory reputation of those con-

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[12] *Id.*, at 345.

nected with Rancho La Costa. The years of news articles respecting these figures was *not* a "shoebox" full of hearsay. It was competent evidence[13] of the reputations which these individuals permitted to develop and which was necessarily known to Rancho La Costa and its principals. They surely invited attention and comment by initiating a heavily advertised legitimate business as a front for such notorious principals.

Given the years of publicity, appellants were entitled to assume appellees to be in the public domain for purposes of free non-malicious discussion. In *Gertz*, it was intimated that media defendants could not be held to a higher standard than *New York Times* malice when the libelous nature of a publication is not facially apparent.[14] The rationale for such a requirement is that a reasonable publisher, editor or reporter would not in such circumstances be on notice of the danger of civil liability implicit in the publication. For the same reason, media defendants should not be held to a higher standard than knowing or reckless disregard of the truth or falsity of a publication when a reasonable publisher would deem the subject of its reporting to be a public figure. Surely any publication embarking upon an article respecting well-publicized personages is entitled to assume that they have invited public attention and comment and to act upon that assumption.

The California Court of Appeal's errant labelling of appellees as private individuals was exacerbated by explicit directions to the trial court to proceed on an impermissible no-fault standard. The sole California statute which would purport to impose a fault standard upon appellees' libel

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[13]C. McCormick, *Law of Evidence* § 249, p. 595 (2d ed. 1974), California Evidence Code § 1324 and Federal Rule of Evidence 803(21).

[14]*Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323, at 331 n.4.

action is subsection 3 of Section 47 of the California Civil Code.[15] Nevertheless, ignoring prior California authority, the Court of Appeal held that the appellants were not entitled to the protection of that section. 106 Cal. App. 3d 646, 664-68. Accordingly, the Court of Appeal remanded the action to the trial court for the purpose of determining at trial whether the appellees were public figures (which in turn would depend upon proving the truth of the publication to the effect that they were involved in organized crime) and, failing that, suffer the imposition of whatever damages appellees prove.

> The plaintiffs are entitled to recover if they can prove (1) the publication of a libelous statement, and (2) damages arising therefrom. Defendants are still entitled to prove if they can the fact that plaintiffs are public figures. They have the burden of proof thereon. . . . If the defendants so prove that plaintiffs are public figures, then plaintiffs in order to recover must, in addition to proving the publication of a libelous statement, prove that the publication was made with malice

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[15]California defined for itself the appropriate standard of liability for defamatory statements, and provided in Section 47(3) that there is a qualified privilege for the publication of defamation:

> § 47. [Privileged publication or broadcast: what constitutes] A privileged publication or broadcast is one made —
>
> . . .
>
> 3. In a communication, *without malice*, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information. (emphasis added.)
>
> . . .

as that term is defined under California law and damages therefrom.

106 Cal. App. 3d 646, at 668.[16]

Such a retreat to pre-1964 defamation law is plainly contrary to the holding in *Gertz* that the states may not impose liability without fault upon media publications. (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); Restatement Second of Torts § 600 (1977), and Comment thereto.)

**Conclusion.**

It may fairly be inferred that since *Rosenbloom* the opinions of this Court have been designed to bring into balance the interests in private reputation and in public information. However the opinion of the court below graphically illustrates that state courts, and particularly those in California, have swung the pendulum past the point of balance and dangerously intruded upon interests of free speech and press and consequently the right of the public to be informed. Just as this Court's 1979 decision in *Gannett*[17] was balanced

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[16]The practical impact of this out-of-date rule of strict liability was poignantly described in Laurence H. Eldredge's article *Practical Problems in Preparation and Trial of Libel Cases*, 15 Vand. L. Rev. 1085, 1089-90 (1962) as follows:

> I know of no other type of tort case in which it requires so little time to present the plaintiff's case in chief, in the absence of evidence of special harm. Where the words are clearly defamatory on their face and appear in a newspaper article and there is no claim of special damages, the plaintiff's case in chief may be rested within a few moments after the completion of the opening speech. All that is required is to get the article in evidence, and you have proved your case in chief. I like to do this by subpoenaing the publisher of the paper to bring it with him; then I call him on cross-examination and have him produce and identify the paper, at which time I offer it in evidence. At this point, I generally get him to state (when it is impressive) what the newspaper circulation is and its area. There is no need to put the plaintiff on the stand but it is good strategy, unless there is some reason not to subject the plaintiff to cross-examination, to put him on very briefly and have the jury look at him and hear him tell about how emotionally upset the article made him, if that is a fact.

[17]*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

and clarified by *Richmond Newspapers,*[18] so is a further review by this Court of the opinion below required to bring into balance the interests of reputation and public information in a fashion which preserves the "breathing space" for fruitful exercise of freedoms of speech and press deemed paramount in *Gertz*.

Respectfully submitted,

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[18] *Richmond Newspapers, Inc. v. Virginia,* .... U.S. .... , 65 L. Ed. 2d 973 (1980).